IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

AP No. 19/97

IN THE MATTER of an Appeal from the determination of the District Court at Wanganui

BETWEEN **THE TARANAKI FISH AND GAME COUNCIL**

Appellant

AND **KIRK McRITCHIE**

Respondent

Coram: Neazor J
Greig J

Date of Hearing: 9 December 1997 at Wellington

Date of Judgment: 14 MAY 1998

Counsel: Rt Hon. Sir Geoffrey Palmer, M. Chen and J.R. Handley for Appellant
M.A. Solomon and B. Keane for Respondent

JUDGMENT OF THE COURT

Solicitors:
Chen & Palmer, Wellington for Appellant
M.A. Solomon, Wellington for Respondent

This appeal by way of case stated relates to the acquittal of the respondent on a charge that he committed an offence against s 26ZI(1)(a) of the Conservation Act 1987 in that he fished for sports fish during an open season while not being the holder of a current licence authorising him to fish for sports fish.

The respondent is a Maori who claimed by way of defence that he was at the time exercising a fishing right available to him by reason of the circumstances and of two provisions of the Conservation Act, ss4 and 26ZH.

Section 4 of the Act provides that the Act "shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi".

Section 26ZH, which is in Part VB of the Act (as is s 26ZI) is in terms that "nothing in this Part of this Act shall affect any Maori fishing rights".

It was not disputed that the term "sports fish" in the charge referred to freshwater fish (trout) which is not an indigenous species and was introduced after the signing of the Treaty. It was also accepted for the purposes of argument that Maori have fished for trout in the particular river as a food source since the introduction of trout into it, although to a lesser extent than they fished for indigenous species. When that introduction took place is not recorded.

The learned Judge held that the statutory provisions provided a defence to a Maori from hapu or iwi having traditional territorial authority over a river fishery to fish for trout without a licence, provided:

(a) that person did so according to the terms of local kawa/protocol and was able to prove that he or she was properly authorised to do so;

(b) the fishing was for personal/family consumption or for hui/tangi and the like; and

(c) that the fishing did not impinge upon the conservation and sustainability of the trout resource and that the respondent as a matter of fact had made out that defence on the balance of probabilities.

Accordingly he was found not guilty.

In the case stated, the learned Judge set out his determinations on matters of law:

(a) if the respondent had been fishing for indigenous fish the defence under section 26ZH would clearly have been made out;

(b) the Act is unique in the combined inclusion of its recognition that "Nothing in this part of the Act shall affect any Maori fishing rights" and the provision in s 4 that requires the Act to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi;

(c) the phrase "fishing rights" used in s 26ZH includes rights based on the Treaty of Waitangi, and rights based on aboriginal title;

(d) the protection of "their fisheries" in Article II of the Treaty of Waitangi is not limited to species of fish caught at 1840, but has a much wider meaning encompassing the activity and business of fishing, the place where fish were caught, and the right to take fish;

(e) the argument that species introduced after the signing of the Treaty of Waitangi are not included is incorrect;

(f) there is a Maori fishing right to fish for trout because:

    (a) introduced fish were reasonably within the contemplation of the signatories to the Treaty of Waitangi;

    (b) clear principles enunciated in the series of leading Court of Appeal cases are not inconsistent with trout being included within the right;

    (c) the fisheries legislation does not exclude trout from the ambit of "Maori fishing rights". The right to govern does not extend to the right to remove or restrict precisely that which the Treaty of Waitangi protects. In any event the fisheries legislation does not expressly limit or restrict Treaty rights. To the extent that the fishing right arises from aboriginal title, it exists until it has

been specifically and clearly extinguished by Parliament with free consent;

(d) to exclude trout will result in an inherent practical absurdity in that Maori will be required to distinguish between pre-Treaty and post-Treaty species, which was held not to be Parliament's intent.

The questions stated for the opinion of Court are:

(1) Are the "Maori fishing rights", referred to in s 26ZH of the Conservation Act 1987, considered in the light of s 4 of that Act, "aboriginal" (customary) rights or "treaty" rights, or both, and is there any distinction?

(2) Are the "Maori fishing rights" as described and protected in the Conservation Act, rights in respect of particular rivers or parts of rivers or are they species restricted?

(3) Do the "Maori fishing rights", described and protected in the Conservation Act, include the right to fish in a river for non-indigenous trout, as qualified in my judgment:

(a) without a licence; and/or
(b) in a method that is inconsistent with the scheme of the Taranaki District Anglers Notice although no offence was committed thereby and even though no evidence was led to establish that the method actually used detrimentally affected the conservation of the trout resource?

(4) Assuming "Maori fishing rights" otherwise include the right to fish for trout in a river as set out in my judgment, have those rights been abrogated or restricted by relevant legislation, particularly the Conservation Act 1987 and/or by the consent of Maori?

(5) Was the decision correct?

In this case it is useful to set out in an extended form the process of the Judge's decision:

(a) that the essential ingredients of the offence had been made out: the respondent had fished for sports fish from freshwater during an open season when he was not the holder of a current licence authorising him to do that;

(b) that if the fishing was for an indigenous fish, the defence would clearly have succeeded. (The appellant does not dispute that; indeed the existence of a Maori right in the circumstances of this case to take indigenous fish is a necessary part of its argument, to give meaning to ss 4 and 26ZH of the Conservation Act);

(c) s 4 of the Act incorporates the Treaty into the Act. The proper approach in such a case is that expressed by Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655:

> "... The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to commit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or *working out the import of an express reference to the principles of the Treaty*. (Emphasis added)."

(d) that statutory references to principles of the Treaty include the express terms of the Treaty, when that is still appropriate: *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC);

(e) that it is unnecessary in this case to decide whether the "Maori fishing rights" referred to in s 26ZH are regarded as Treaty rights or as a matter of aboriginal title often referred to as Maori customary rights. (Both parties to the appeal agree).

(f) by reference to reports of the Waitangi Tribunal to which weight should be given (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 661) the words "their fisheries" in Article II of the Treaty mean more than just the species of fish caught as at 1840 and refer to the place where fish are caught, the types of fish to be found, the right to fish or the business of fishing;

(g) the Court of Appeal held in *Te Runanga O MuriWhenua Inc v Attorney-General* [1990] 2 NZLR 641 that "the Treaty is a living instrument and has to be applied in the light of developing national circumstances"; thus the Treaty can be applied to a modern day context rather than remain frozen at 1840. Applying the meaning adopted for the term "their fisheries", prima facie trout seem included within the right, and the timing of their introduction to

rivers/lakes is not relevant. The argument of the appellant would effectively restrict the fishing right preserved in the Treaty to rights existing at 1840;

(h) based on Waitangi Tribunal reports, and Court of Appeal decisions in respect of sea fisheries, Treaty rights considered in relation to such fisheries include a right of development which extends to sharing in new species developed in the commercial sea fisheries since 1840. None of those decisions refers to introduced fish, but it would be reasonable to extend "Maori fishing rights" to include a species introduced after the Treaty was signed. Reference was made also to development, in the sense of a new use of an existing resource, as discussed in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553. (It is to be noted, however, that the Court of Appeal itself indicated that that decision was likely to be of very limited precedent value);

(i) distinguishing *Te Runanga O Te Ka Whenua Inc v Attorney-General* [1990] 2 NZLR 641 (relating to hydro-electric dams), it would have been reasonably in contemplation in 1840 that new species of fish over time would be introduced into the colony's rivers and lakes, and that if asked Maori would then have asserted a claim to fish for any such fish;

(j) the informant argued that whatever the scope of "Maori fishing rights" successive legislation clearly excluded trout from it; trout have always been part of a separate regime as to their physical production and legal control, and the funding of both. The argument was not accepted because:

(i) the right to govern under Article I of the Treaty does not extend to the right to remove or restrict the "full exclusive and undisturbed possession of their ... fisheries" under Article II;

(ii) the legislation relied on by the appellant does not expressly limit or restrict the right; at best it does so only by implication and much clearer words would be necessary to achieve the result. Further, ss 4 and 26ZH allow the Court to give a fuller interpretation of Maori fishing rights rather than perpetuate a view which conflicts with the Treaty;

(iii) related to (ii), if Maori fishing rights arise from aboriginal title and include rights over waters as a whole rather than just the species found there, they can only be extinguished specifically by Parliament and with the free consent of the native occupiers;

(iv) Parliament could have specifically restricted s 26ZH so as plainly to exclude trout - accepted by the Judge not to be a strong argument;

(v) the legislative provision made for Tuwharetoa and Arawa Tribes is equivocal in effect - it could support the appellant's view or be a

legislative recognition of an existing right contended for by the respondent;

(vi) the appellant's position contains an inherent practical absurdity, which should not be held to be Parliament's intention: that a Maori fishing for native trout or for any fish without a licence, to avoid committing an offence would have to throw back any introduced trout caught.

The essential argument for the respondent, is that the words in s 26ZH "any Maori fishing rights" are to be construed by reference to Maori custom of fishing and the place and activity of fishing. On this approach, the defence is made out if the respondent can show that Maori people with whom he has a sufficient connection were accustomed to fishing in particular freshwater and that he was fishing for purposes for which that fishing was customarily done; and there is no justification for limiting the defence to any particular species of fish. The right is properly based either on Article II of the Treaty of Waitangi which is given statutory effect in this case because of the reference in s 4 of the Act, or on Maori customary rights given recognition by the reference in s 26ZH to Maori fishing rights.

For the appellant, the essential argument is that the focal point in this case is not the activity of fishing, but the particular species of fish; that fishing for that species has always been the subject of statutory control which the Crown was entitled to exercise under Article I of the Treaty of Waitangi, and has exercised consistently; and that there has never been occasion for Maori to acquire a right to take such fish regulated only by Maori custom and not by the statutory provisions.

The appellant's argument goes on to what might be described as three fall-back positions:

(a) that s 10 of the Treaty of Waitangi (Fisheries Claims) Act 1992 preclude a Maori fishing rights defence, notwithstanding s 26ZH of the Conservation Act;

(b) that if a Maori fishing rights defence applies to trout, it does not exempt Maori from the licensing regime in respect of that fish since the two can co-exist;

(c) even if the defence exempts Maori from the requirement to have a licence, the defence was defined too broadly by the Judge as to the conditions in which it applies and contains insufficient limitations to conserve the trout resource and uphold the policy of the Conservation Act.

Expanding on those arguments:

For the appellant:

1. Whatever may have been said about Treaty rights in respect of sea fisheries where the fish are indigenous, New Zealand statutes since introduced trout have been in New Zealand have been species specific in respect of that kind of fish.

2. Previous and current regulation of sports fish represents a legitimate exercise of the Crown's power of governance under Article I of the Treaty.

3. The history of the legislation about sports fish coupled with the highly prescriptive nature of the present statute governing such fish is an exercise of the Crown's Article I powers in the interests of conserving the sports fish resource. The history shows that Parliament intended to exercise governance functions in relation to the introduction and propagation of trout in New Zealand.

4. There is a demonstrable Parliamentary intention that sports fish be managed separately and uniquely. That fishery is managed and maintained by (now) Fish and Game Councils to provide a recreational fishing resource for the public, and is funded by those who use it.

5. The sports fish regime is undermined and the intention of Parliament is disturbed if a significant segment of the population is allowed to fish outside the structure. Maori fishing rights over trout are inconsistent with the statutory scheme and the Crown's conservation responsibilities take priority. Section 26ZH provides Maori with protection over all freshwater fish except sports fish.

6. Even if the Maori right is derived from aboriginal title and not the Treaty, the right must be taken to have been extinguished by the statutory regime because that covers the field.

7. The scope of any Maori fishing right should in any event not be taken to extend to trout. There is no New Zealand case law defining the content or scope of a fishing right; it would be appropriate to apply Canadian cases

where the question is posed whether the fishing is integral to a distinctive culture.

8. A distinction between introduced and indigenous species would not create a practical absurdity.

9. A right to development is not established in law.

For the respondent:

1. The judgment appealed from is compatible with decisions in respect of Maori customary sea fishery rights e.g. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 and *Paku v Ministry of Agriculture and Fisheries* [1992] 2 NZLR 223 and with comparable Canadian decisions i.e. that if rights are to be validly exercised, that must be done in accordance with proper tribal custom, with appropriate tribal authority and subject to over-riding conservation measures.

2. There is no argument on behalf of the respondent or his Iwi that conservation has paramount importance both in terms of the law and in terms of their own tikanga (customs and laws). If conservation is threatened or rights are not exercised in accordance with correct protocols, the defence of native fishing rights will not succeed.

3. The purpose of the legislation will not be frustrated by recognition of a Maori right to fish for trout - the issue is whether the statutory regulations are a justified infringement of the right similar to the approach taken by Canadian Courts; something to be determined on a case by case basis.

4. Whether Maori fishing rights are to be considered as Treaty based or as customary rights, the proper interpretation is made in a holistic sense having regard to the custom of fishing and the place and activity of fishing. That is to be preferred to a species based approach.

5. Properly authorised Maori may fish for trout using fishing methods inconsistent with those specified in the relevant district Anglers Notice provided they do so in a manner which does not threaten conservation or the sustainability of the resource.

6. There has been no express or implied repeal of Maori freshwater fishing rights.

7. The appellant's argument that the decision would undermine the conservation and financial aspects of the sports fish regime (because many people could fish outside that regime) is illusory because to have a defence a Maori charged would have to be from the local area or related to the local tribe and be fishing with appropriate Maori authority. Anyone without such authority would not

have a valid defence, and any Maori fishing for recreational purposes would have to have a licence.

Counsel on both sides developed their arguments comprehensively and with compendious references to authority and to other documents.

To determine the question of law, it is necessary to trace the development of legislative provisions relating to the trout introduced into New Zealand freshwater.

Salmon and Trout Act 1867:

This Act was passed in contemplation of introduction of the fish from abroad. Its provisions were seen as "necessary ... for the preservation and propagation of salmon and trout on their arrival in this Colony".

The Act authorised the making of regulations to achieve its general purpose, including:

(a) prohibiting or restricting from time to time for any period fishing in any river or stream in which young trout fry or spawn was placed or deposited;

(b) imposing conditions and restrictions in respect of trout fishing and regulating the times and seasons in each river or stream for such fishing;

(c) prohibiting the use of particular devices in any river or stream in which young trout fry or spawn was placed, or any practice tending to be detrimental to the increase of trout;

(d) regulating the equipment used for fishing;

(e) preventing pollution of any stream or river in which young trout fry or spawn were placed;

(f) any other matter or thing which in any manner related inter alia to fishing for trout.

The Act authorised extension of its controls to other fish by declaration that they were protected fish. The Act contained no particular provision for licensing people to fish, and no reference to Maori fishing.

***Protection of Animals Act 1867*:**
This Act, which related to the protection of "certain animals and birds" (not fish) and the registration of rules of Acclimatisation Societies was enacted on the same day as the Salmon and Trout Act. It provided for licensing hunters and also for prohibition of hunting some indigenous game. Consolidating Acts dealing with animals and birds were enacted in 1873, 1880, 1907, 1908, 1914 and 1921.

***Fish Protection Act 1877*:**
This Act was a general provision for regulating fisheries and encouraging their establishment. It covered "any fishery in any waters [salt and fresh] brought within the operation of the Act" and "all fish ordinarily inhabiting the waters of the colony, whether fresh or salt water". It authorised the making of regulations for the constitution of districts, declaring what waters should be fisheries for the purposes of the Act, setting apart waters for the propagation of fish and regulating the times and methods by which fish could be taken in any fishery.

The Act also allowed the grant of exclusive rights by licence to use any fishery on payment of fees.

The Act provided for the preservation of Maori fishing rights:

> "8. Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."

Fisheries Conservation Act 1884:

The Fish Protection Act 1877 was "incorporated" with the Act of 1884 by virtue of s 2 of the latter Act. The Act dealt with "all fish ... inhabiting the waters of the colony, whether indigenous or not ..." and with all waters, fresh or salt unless privately owned. The Act authorised the making of regulations providing for "the more effectual protection and improvement of fish, and the management of any waters in which fishing may be carried on", and then specifically for closed seasons, controlling the sale of fish, limitations on the size of fish taken and on the kinds of equipment and methods of fishing used and for the protection of young fish or spawn placed in any waters, and prohibiting some forms of pollution of rivers and streams.

By s 3 of the Act, nothing in it applied to any person taking fish out of water of which he was the owner or under the authority of the owner, or "any person who, having unintentionally taken any fish ... contrary to the provisions of this Act, shall immediately return the same with as little injury as possible to the water".

The Salmon and Trout Act 1867 was still in force in 1884, having been amended by Act No. 47 of that year.

Regulations after 1884:

On 7 October 1884 all fish which had been introduced into the colony were declared under the Salmon and Trout Act to be protected fish: NZ Gazette 1884 p 1431.

General regulations prohibiting the taking of salmon or salmon trout were made under the Salmon and Trout Act on 6 September 1877 (NZ Gazette 1877 p 930), added to under the same Act in respect of trout, which were required to be returned to the water from which they were taken, on 28 January 1879 (NZ Gazette 1879 p 137).

Particular added regulations allowing fishing for trout with a licence were made under the Salmon and Trout Act 1867 and the Fisheries Conservation Act 1884 for the South Canterbury District on 29 September 1885 (NZ Gazette 1885 p 1112) and

thereafter for other South Island districts and Wellington. Regulations were made under both Acts for Wanganui (the District in question) on 16 September 1890 (NZ Gazette 16 September 1890 p 1003).

The Fisheries Conservation Act 1884 did not contain specific provision involving acclimatisation societies in the issue of licences for fishing until the amendment of that Act in 1902. That amending Act gave additional regulation making powers:

(a) prescribing conditions or restrictions upon the taking or having possession of any fish;

(b) providing for the issue of licences to take fish or certain kinds of fish and details of such licensing including the payment of fees;

(c) providing for the payment to acclimatisation societies of licence fees or fines for the purpose of the distribution, rearing, cultivation or protection of fish in the society's district.

The Act provided also for societies to take over hatcheries on land taken for public works.

Further regulation - making powers in relation to licences were given by the Fisheries Conservation Amendment Act 1903.

Comment:

Review of the statutory provisions down to 1908 demonstrates that the statutory authority to involve acclimatisation societies in the regulation of trout fishing came not through the various Animals Protection Acts which related to birds and animals, but through the Fish Protection Act of 1877 and the Fisheries Conservation Act 1884 and its amendments. It is explicit that the 1884 Act had incorporated in it the Fish Protection Act 1877, for whatever effect that incorporation had, which contained the reservation already set out of Maori fishing rights under the Treaty of Waitangi. It is also explicit that the 1884 legislation contemplated and provided for the factual

situation of a person fishing who unintentionally caught a fish of a kind subject to regulation.

Fisheries Act 1908:

The Salmon and Trout Act 1867 and the Fisheries Conservation Act 1884 and its amendments were consolidated in the Fisheries Act 1908. Part II of that Act (ss 78 to 99) dealt with freshwater fisheries. "Fish" was defined for that Part as meaning "all fish inhabiting waters as defined by this Part ... whether indigenous or not ... and includes salmon and trout". "'Waters' meant any salt or freshwaters in New Zealand ... but does not include private waters".

Section 83 provided for regulations, inter alia:

(a) providing for the more effectual protection and improvement of fish, and the management of waters in which fishing may be carried on;

(b) providing in respect of any fish other than trout, for closed seasons (the closed season for trout was fixed by s 93);

(c) imposing any conditions or restrictions upon the taking of any fish, or upon having the same in possession;

(o) providing for the issue of licences to take fish or specified kinds of fish;

(p) prohibiting or restricting the taking of or fishing for fish or certain kinds of fish without a licence;

(s) prohibiting or regulating the export from New Zealand of trout, salmon or any other acclimatised fish.

All regulations were to have effect as if enacted in the Act (s 86(2)). The Act did not define the term "acclimatised fish".

There was a particular regulation-making power in respect of imposing or prescribing any conditions and restrictions in respect to salmon, trout or perch fishing (s 94).

Section 88 continued the provisions that nothing in Part II of the Act or in regulations thereunder should apply to any person taking fish in private waters of which he was the owner or when authorised to do so by the owner; or to "any person who, having unintentionally taken any fish contrary to the provisions of this Part of this Act, immediately returns the same, with as little injury as possible to the water".

Section 90 authorised a person in lawful occupation of any land to fish without licence or payment of fee upon such land, without being liable to a fine.

Under Part I of the Act, which related to sea-fisheries, no Maori could be prosecuted under that Part without the consent of the Native Minister (s 76) and s 77(2) provided that "nothing in this Part of this Act shall affect any existing Maori fishing rights". There were no comparable provisions in Part II in respect of freshwater fisheries.

In October 1908, by the Fisheries Amendment Act, particular provision was made for the issue, on the recommendation of the Maori Council of the Arawa Maori District, of up to 20 licences per season to fish for trout in the Thermal Springs District at a maximum fee, for personal and family consumption only. Further specific provision was made in 1926, under the Maori Land Amendment and Maori Land Claims Adjustment Act of that year, reserving to members of the Tuwharetoa tribe the right to fish for indigenous fish in Lake Taupo (but not for sale) and providing for the issue of up to 50 licences free of charge to nominated members of the tribe to fish for imported fish. Statutory provision for negotiation of an agreement that led to that result had been made in s 24 of the 1924 Act of the same title.

In 1938 by the Maori Purposes Act 1938 particular provision was made prohibiting fishing in and taking trout from Lake Roto-Aira and part of the Poutu Stream but reserving rights therein to members of Ngati-Tuwharetoa without license or fee.

General regulations in respect of licences to fish for trout and perch for all acclimatisation districts were made under the 1884 Act on 23 August 1907 (NZ Gazette 1907 p 2685), and were continued in force under the 1908 Act - see s 1(2)(b) Fisheries Act 1908.

1936 Freshwater Fisheries Regulations (SR 36/1936:

These regulations were expressed generally in terms of "acclimatised fish" and sometimes "trout".

Fisheries Amendment Act 1948:

The regulation-making power in s 83 of the 1908 Act, as inserted in 1948, dealt with "trout or other acclimatised fish" (s 83(2)(a)), "fish" (s 83(2)(b)) and "indigenous fish" (s 83(2)(c)). Section 83(2)(c) was expanded to:

> "(c) Prohibiting or imposing restrictions and conditions on fishing in any waters or in any specified part or parts thereof, or the taking of any species of fish therein, and, in the case of indigenous fish, exempting Maoris either wholly, partially, or conditionally, or in respect of any specified waters, from the operation of any such prohibition, condition, or restriction."

In so far as Hansard debates are helpful that change was designed "to allow restrictions to be imposed to protect with full recognition the existing rights of the Maori people" (The Hon. Mr Hackett, Minister of Marine: NZPD (1948) Vol 281 p 1338) and "allows restrictions to be imposed while specifically recognising the existing rights of the Maori in relation to indigenous fish. That is a most important provision, as for many years the Maori people have had certain rights in regard to the fisheries in our lakes and rivers, rights which will be preserved under that paragraph" (Hon. Mr Wilson, Leader of the Legislative Council: NZPD (1948) Vol 282 p 1602).

Freshwater Fisheries Regulations 1951 (SR 1951/15):

The regulations defined "acclimatised fish" as being various trout, salmon and perch. The provisions were written in terms of "acclimatised fish" or specific kinds of such fish.

Regulation 100 prohibited the intentional killing of "small indigenous fish other than elvers", but regulation 102 removed any restriction "on the taking of whitebait or other small indigenous fish for the purposes of scientific research or for purposes of human consumption". That is the only provision which appears to be linked to the 1948 amendment of the regulation making power in s 83(2)(c).

Fisheries Act 1983:

The 1908 Act and its amendments were repealed by the Fisheries Act 1983, an Act to consolidate and reform the law.

In that Act, definitions included:

> "'Acclimatised fish' means every species of fish which the Governor-General may declare, by Order in Council, to be acclimatised fish for the purposes of this Act.
>
> 'Fish' includes all species of finfish of the Classes Agnatha, Chondrichthyes, and Osteichthyes, and all shellfish, at all stages of the life history of such finfish and shellfish; ...
>
> 'Fishery' means one or more stocks or parts of stocks or one or more species of fish, ... that can be treated as a unit for the purposes of conservation or management.
>
> 'Fishing' means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and includes ...
>
> 'New Zealand fisheries waters' means -
> (c) All internal waters of New Zealand;
> (d) All other fresh or estuarine waters where fish indigenous to or acclimatised in New Zealand are found."

Part V of the Act dealt with freshwater fisheries, including the responsibilities of Acclimatisation Societies. Section 68 made it an offence, subject to the Act, to take an acclimatised fish from any waters of an acclimatisation district unless the holder of a licence issued under regulations authorising the taking of such fish at such time. The Director-General had power (s 70(1)) by notice to prohibit or impose restrictions on fishing in any waters generally or in respect of any particular species of fish, and in the case of fish other than acclimatised fish to exempt communities wholly, partially or conditionally or in specified waters from the effect of any prohibition or restrictions made by notice.

Acclimatisation Societies were made responsible (s 71) for the protection, management and enhancement of all acclimatised fish species and their habitats, and the conservation of all indigenous freshwater species and their habitats. In the performance of those responsibilities the Societies were required to abide by the requirements of the Act and any regulations made under it.

The Act continued in s 88(1) the provision equivalent to s 88 of the 1908 Act excluding application of the statutory provisions to a person who unintentionally took but returned to the water a fish the taking of which was controlled by the Act and regulations.

Section 88(2) provided that "nothing in this Act shall affect any Maori fishing rights". There were two changes in this provision from the 1908 provision - it extended to freshwater fisheries and no longer referred to "existing" Maori fishing rights.

Freshwater Fisheries Regulations 1983 (SR 1983/277):
These regulations specified what were "acclimatised fish" (various trout, salmon, perch and tench) and controlled generally the taking of "acclimatised fish". Regulations 70 and 71 were in similar terms to regulations 100 and 102 of the 1951 regulations except that the adjective "small" was omitted.

Conservation Law Reform Act 1990:

The Conservation Law Reform Act 1990 established the New Zealand Fish and Game Council with functions related to sports fish and game, and transferred the legislative provisions as to the control of freshwater fisheries from the Fisheries Act to the Conservation Act where the provisions are contained in Part VB.

The relevant definitions are essentially the same except that an "acclimatised fish" is now a "sports fish":

> "'Fishery' means one or more stocks or parts of stocks or one or more species of freshwater fish or aquatic life that can be treated as a unit for the purposes of conservation or management:
>
> 'Fishing' -
> (a) means the catching, taking, or harvesting of freshwater fish; and
> (b) ...
>
> 'Freshwater' means -
> (a) ...
> (b) ...
> (c) All other fresh or estuarine waters where freshwater fish indigenous to or introduced into New Zealand are found;
> (d) ...
>
> 'Freshwater fish' includes all species of finfish of the Classes Agnatha and Osteichthyes, ...
>
> 'Indigenous fish' means any freshwater fish that is indigenous to New Zealand;
>
> 'Sports fish' means every species of freshwater fish that the Governor-General may declare, by Order in Council, to be sports fish for the purposes of this Act; any any such Order in Council may be expressed to apply to freshwater fish in any specified freshwater or other waters."

Section 2(3) provided:

> "For the purposes of this Act, the Governor-General may from time to time, by Order in Council, declare any species to be included in or excluded from the definitions of the terms 'aquatic life', 'freshwater fish', or 'sports fish' in subsection (1) of this section; and any such declaration may be expressed to apply to any species in any specified areas or waters, or generally throughout New Zealand."

Part VB of the Act (ss 26ZG-26ZR) relates to freshwater fisheries. Section 26ZH provides that "nothing in this Part of this Act shall affect any Maori fishing rights". The relevant offence provision, s 26ZI makes it an offence to take sports fish from any freshwater at any time, unless the taker is the holder of a licence issued under the Act. There is a regulation-making power which includes provision as to the Minister authorising the issue of licences to fish.

Section 26ZG(2)(b) continues the provision which exempts from Part VB of the Act any person who, having unintentionally taken any freshwater fish contrary to the provisions of the Act or regulations immediately returns the fish with as little injury as possible to the water.

The Freshwater Fisheries Regulations 1983 were deemed by s 39 of the Conservation Law Reform Act to have been made under the Conservation Act, but with the modification that an "acclimatised fish" became a "sports fish". Thus the provisions of regulations 70 and 71 as to the taking of indigenous fish for human consumption continued in effect.

Summary:

The legislative history shows a general consistency of approach to introduced fish:

(a) the taking of fish such as trout and salmon in freshwater has been controlled by primary or subordinate legislative provision since the fish were introduced to New Zealand;

(b) the control has not in terms of primary legislation always been specific as to the fish the taking of which was controlled. Specific legislation existed in the form of the Salmon and Trout Act 1867 until its repeal in 1908 but the line of legislation beginning with the Fish Protection Act 1877 was non-specific, leaving provision of the element of specificity to subordinate legislation. In 1908 there was some element of specificity in the primary legislation in the power to make regulations as to salmon and trout.

From 1983 what fish would be the subject of control was left to be determined by subordinate legislation. That is the present position. On the face of it, control could be applied to any freshwater fish;

(c) the legislation has since 1884 contemplated persons fishing in freshwater unintentionally taking a "regulated" fish and returning it to the water;

(d) except between 1908 and 1948 the legislation has since 1877 for the most part included some special provision safeguarding or enabling the safeguarding of Maori fishing rights:

( ) from 1877 by reference to the Treaty of Waitangi;
(i) possibly continued after 1884 by the "incorporation" of the 1877 Act in the 1884 Act;
(ii) there was no specific provision for protection in respect of freshwater fisheries from 1908 until 1948 when provision was made for regulations specifically in favour of Maori in respect of indigenous fish;
(iii) the 1948 power was not used in that way - exempting provision was made in 1951, but not just in favour of Maori, dealing with "small" indigenous fish taken for food;
(iv) specific protection of Maori fishing rights was given in the 1983 primary legislation and the present legislation;
(v) the general regulatory exemption in respect of indigenous fish taken for food was extended to all such fish in 1983 and continues to the present.

(e) the provisions so made have been in terms protective of existing Maori rights, not grants of rights to Maori, except in specific areas.

Two general observations can be made, although it must be said that the legislative approach in respect of the second has not been continuously consistent in all respects:

(a) in respect of freshwater fisheries the issue as to Maori fishing rights is not identical with that which arises in respect of sea fisheries: whether the resource was used or not or known about or not (e.g. orange roughy), the sea fish were indigenous in the waters in 1840 and thereafter; freshwater fisheries involve fish indigenous to New Zealand but also those introduced at a known time later than 1840;

(b) the legislation has proceeded on the basis:

(i) that there were existing Maori fishing rights in freshwater; and
(ii) that any rights in respect of non-controlled fish existed alongside the complete control of fishing for introduced fish (as witness the consistent provision about throwing back an unintentionally taken "controlled" fish).

The issue in this case in the end comes down to a narrow one because it is not disputed that Maori had Treaty-based rights to take freshwater fish. We can see no justification for treating the Maori fishing rights reserved by Article II of the Treaty more narrowly than has been said by the Waitangi Tribunal to be the proper approach in respect of sea-fisheries; that what is protected by Article II are the available fish, the places where fish were caught and the methods and practice of fishing, but because of the basis of our decision it is not necessary finally to decide that.

If that was the end of the matter, as a general proposition it would follow that a Maori fishing right in respect of a particular place would extend to all fish found in that place whether indigenous or not: in respect of indigenous fish the right would have existed from pre-treaty times, and in respect of introduced fish from the time the fish became present in the water.

That is not, however, the end of the matter. The particular factor that exists in respect of trout is that the history of the legislation makes it plain that the taking of salmon and trout was from their introduction controlled by law.

Putting the argument in terms that the legislation has always been, and continues to be, species specific, is not in itself helpful because since 1983 at least the primary legislation has not been framed in that way in respect of control of freshwater fish. Maori fishing right protection has been in the primary legislation but specificity of control has not been. The primary legislation has authorised control of all freshwater fish with the Governor-General in Council having the power to declare which species should be controlled as acclimatised fish or (now) sports fish. However, the particular species so declared have so far all been introduced fish and we need not concern ourselves in the present case with the outcome if the Governor-General in Council sought to designate an indigenous fish as a sports fish.

It is the facts first that the controlling legislation predates the introduction of the fish and second that regulatory control has continued in some form in respect of trout to the present that in our view distinguish this case from others. The legislature must have been aware of the presence of indigenous fish in freshwaters, but successive legislation had the effect that there was never a time when trout or salmon were available without control to those who otherwise were free to or had rights to fish in fresh water. Contrary to the learned Judge's view the consistent pattern of regulation, which continues to the present, was to require anyone taking, or later unintentionally taking, a controlled fish to return it to the water. The legislative history is consistent only with the intention that there would be existing species of fish not subject to control and new species that would be so subject. That distinguishes the case from sea fisheries where all fish were indigenous to the waters they inhabited.

The detailed provisions as to management, financing and research in respect of fish, and the argument that many may fish without control, with argued dire consequences for control regime (which at best is speculative), are secondary arguments tending to support the legislative intention. If the term "Maori fishing rights" was properly

interpreted as preserving a Maori fishing right in respect of trout those consequences could not lead to a different conclusion.

In our view, because the taking of trout was always controlled by law, there was never a time when the taking of the fish could have been regarded as an existing and preserved Maori right. So to hold is not to decide that the content of such a right is generally determined by species available and caught in 1840; rather, that by reference to the particular legislation an intention to exclude the fish from any right is properly to be spelt out.

That conclusion in our view determines the issue but particular arguments advanced by the respondent ought to be referred to, even if, in the interests of reasonable brevity, shortly.

First, the argument for the respondent that the right contended for in this case is compatible with that recognised in the *Te Weehi* and *Paku* decisions does not advance the matter. *Te Weehi* concerned indigenous sea creatures (paua); *Paku* related to a fishery officer's power to inspect a vehicle containing fish, but did not turn on what kind of fish were involved. The Canadian cases referred to by counsel also are determinations in respect of indigenous fish. None of these determines, even by analogy, the issue that arises in respect of introduced fish, the taking of which was always controlled by law.

Second, the interest of Maori in conserving fish resources, on which the respondent's concessions in respect of conservation-related conditions for proper exercise of a right were based, does not advance the issue of whether the Maori fishing right protected by the Act extends to introduced trout. Those matters go to the content of the right in respect of the fish, if there is any right at all.

Third, the respondent's submission that the issue is whether the statutory regulations are a justified infringement of the right faces two problems: the first that the submission does not go to the central point whether in light of the legislation any

customary right could have been established in respect of trout; the second that in any conventional approach to New Zealand law, regulations are not open to challenge on the ground of reasonableness - *Carroll v Attorney-General* [1933] NZLR 1461; *Kerridge v Girling-Butcher* [1933] NZLR 646 and *Ideal Laundry v Petone Borough* [1957] NZLR 1038. In the Canadian cases e.g. *R v Sparrow* 70 DLR (4th) 385 the starting point of discussion is s 35(1) of the Constitution Act 1982 which provided that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". The Court's consideration of whether regulations were a justifiable infringement of the right are sufficiently indicated by the judgment of Dickson C.J.C and La Forest J at pp 409/410 of the decision:

> "There is no explicit language in the provision that authorises this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognised and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v The Queen, supra*.
>
> ...
>
> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship,

> grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinised so as to ensure recognition and affirmation.
>
> The constitutional recognition afforded by the provision, therefore, gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s 35(1)."

New Zealand freshwater fisheries law is not constructed like the Canadian law in a way which would allow the Court to enter into an enquiry as to whether regulatory limitations were reasonable and to set aside those found not to be. Nor does the requirement in s 4 that the Act be interpreted so as to give effect to the principles of the Treaty open the way to a determination of the Court that the regulations should be set aside or rewritten in effect by the Court, which is what this submission would lead to.

Finally, the argument that the respondent's right to catch trout unaffected by the regulations is to be recognised as a development right or development of the original Article II Treaty protection of fisheries. In our view cases such as *Ngai Tahu* cannot support the respondent's defence when the issue is not related to a resource existing, whether or not known or relied on at the time of the Treaty, but to a new resource both introduced physically and controlled by law after the Treaty. That, in the circumstances of this case, would go beyond the interpretation of s 26ZH reserving rights, or interpretation of the expression "the principles of the Treaty", to rewriting the effect of the statutory provisions.

Two other of the appellant's submissions might also be referred to shortly, although, on our approach, it is not necessary to do so for the purposes of the decision.

The first is even if a Maori fishing right exists in respect of trout it can still be subject to the requirement that the person fishing should have a licence (and presumably with the restrictions attaching to that licence). The overwhelming answer to that submission is that it requires s 26ZH to be construed as if it made the exercise of Maori fishing rights subject to the provisions of Part VB of the Act or to directions made under authority of Part VB instead of, as it does, providing that nothing in Part VB shall affect any Maori fishing rights.

The second is that s 10 of the Treaty of Waitangi (Fisheries Claims) Act 1992 precludes a Maori fishing rights defence notwithstanding s 26ZH of the Act.

Section 10 provides:

> "It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 -
>
> (a) ...
> (b) ...
> (c) ...
> (c) the rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly -
>
> ( ) ...
> (i) shall not provide a defence to any criminal, regulatory or other proceeding, - except to the extent that such rights or interests are provided for in regulations made under s 89 of the Fisheries Act 1983."

The reference to the Fisheries Act 1983 is the key. For the appellant it was submitted that the definitions of "fish" and "aquatic life" in the Fisheries Act were wide enough to include sports fish designated as such under the Conservation Act and accordingly the statutory bar applies.

It is to be remembered that the Conservation Law Reform Act 1990 preceded the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, so that when the latter Act was passed legislation controlling freshwater fisheries was wholly in the Conservation Act, not the Fisheries Act. The terms "aquatic life" and "fish" in s 2 of the Fisheries Act as defined for that Act are unquestionably wide enough to cover trout. Beyond that, in 1992 there were no provisions in the Fisheries Act 1983 relating to freshwater fisheries or freshwater fish. Such fish could not on any sensible interpretation be regarded as having been "subject to the Fisheries Act 1983" when s 10 of the 1992 Act was passed, simply because they could come within the definitions in the Fisheries Act, and notwithstanding that they were not affected by any substantive provision in the Act.

That freshwater fish were not intended to be covered is supported further by the preamble to the Act which related it to disputes and litigation in respect of sea fisheries. This point in our view is without substance.

In our view the appeal should be allowed on the basis that the acquisition of any Maori fishing right in respect of trout is precluded by the legislation existing at the time of introduction of the species and since.

The formal answers to the questions stated for the opinion of the Court are:

(1) no answer necessary in this case;
(2) no answer necessary;
(3) no;
(4) no answer necessary;
(5) no.

Since this has been argued as a test case it appears unnecessary to remit it to the District Court for implementation of the decision, but if the parties wish to proceed differently, counsel may apply.

Costs reserved.

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May 14, 1998

Bryce Johnson
Director
New Zealand Fish & Game Council
P O Box 13-141
WELLINGTON

Dear Bryce

Taranaki Fish and Game Council v Kirk McRitchie

1. We have previously transmitted to you a copy of the Judgment of the Full Court of the High Court delivered today in this case. The Court took the unusual step of issuing a media statement so that its decision could be properly understood by the public. As the media statement makes clear, and it is quite accurate "There is no Maori fishing right in respect of trout".

2. We thought it would be helpful to set out our preliminary views of the decision of Neazor and Greig JJ.

3. The first point to be made about the decision is that it ruled in your favour on the most fundamental ground possible. You will recall that our first argument to the Court, both in the Submissions and orally, was that no Maori fishing rights defence exists for trout. That argument has been upheld.

4. The great advantage of the decision from the Fish & Game Council's point of view is that none of the complications that could have resulted from the other grounds of appeal that were advanced now arise. In particular, the third argument about the content of the defence in the Court below being defined too broadly is no longer relevant.

5. The second point that should be made about the Judgment is that the basis of it is to uphold the power of Parliament to legislate. It was the historical analysis of the legislation that we stressed in the oral argument that appears to have been critical. The Court has taken the historical arguments very seriously indeed and relied on them; the result is a decision which upholds Article I of the Treaty over Article II.

Chen & Palmer

6. A third feature of the decision which is of considerable utility to you is the fact that there are no further proceedings that flow from it. There were two questions in the actual Case Stated that the Court answered, and they answered them both in the negative.

> Question:
>
> "Do the 'Maori fishing rights', described and protected in the Conservation Act, include the right to fish in a river for non-indigenous trout, as qualified in my judgment:
>
> (a) without a licence; and/or
>
> (b) in a method that is inconsistent with the scheme of the Taranaki District Anglers Notice although no offence was committed thereby and even though no evidence was led to establish that the method actually used detrimentally affected the conservation of the trout resource."
>
> Answer: No.

7. The second question was Question 5 - "Was the decision correct?" That was also answered in the negative.

8. The result is that there is no need for the case to be remitted to the District Court; the decision stands as it is; the District Court decision is overruled and the matter is at an end unless there is an appeal. This is a very clean situation from a legal point of view and in our view is ideal.

9. The question therefore becomes is an appeal likely? We take the view that the Judgment is both careful and robust. We think it would be extraordinarily difficult for it to be reversed on appeal. That is not to say that Maori interests will not want to do that. You will recall that we had previous discussions on whether some negotiation might be entered into. In our view this legal decision is so tidy and so fundamental that you ought not to commit yourself to negotiating away the fruits of this legal victory as a price for Maori not taking an appeal.

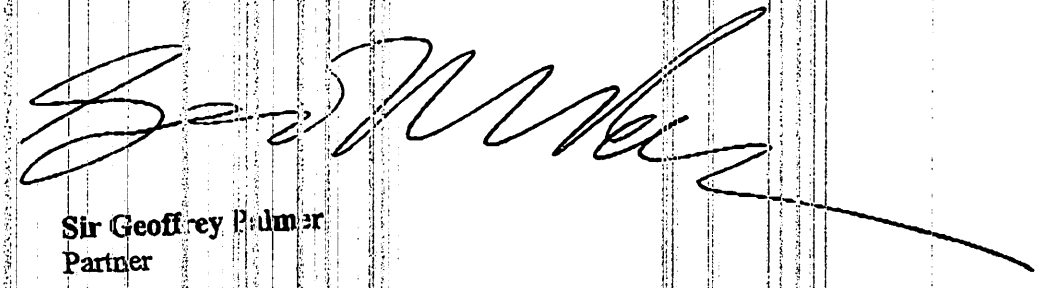
10. The High Court has declared the law to be as we have consistently advised you that it is. We do think, however, that it would be advisable for you to be generous and to ensure that the obligations the Councils have under the Conservation Act to take into account Treaty matters is fully and consistently followed, as we have advised you in the past.

11. The question of costs was reserved by the Court, but we do not think you should take this up. In any event, in the case of a criminal prosecution, the costs would be small compared with what obtains in a civil case.

12. In conclusion, can I say how delightful it was to work with you over all the months that led to this decision. As a firm, we found it a truly fascinating experience. We came to have a more significant appreciation of the place Fish and Game Councils play in enhancing the quality of life in the great New Zealand outdoors.

Best wishes,

Yours sincerely



Sir Geoffrey Palmer
Partner

"Fish and Game and Maori have much in common in their desire to protect habitat, maintain water quality and ensure the sustainable use of natural resources. We will continue to look for opportunities to work with Maori on these issues, he said.

Ends

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Fish & Game
NEW ZEALAND

NEWS RELEASE

May 14 1998

Fish & Game New Zealand hails "common sense" decision

Today's High Court decision that there is no Maori fishing right for trout is a decision for common sense, Fish and Game New Zealand director Bryce Johnson said.

The court reversed last year's Wanganui District Court decision acquitting Kirk McRitchie of fishing for trout without a licence. McRitchie claimed he was exercising his customary fishing right under the Treaty of Waitangi.

Taranaki Fish and Game Council appealed the decision, saying trout are an introduced species that arrived after the signing of the Treaty and therefore Maori, like everyone else, need a licence to fish for them.

Mr Johnson said the decision was a reminder that there were three Articles in the Treaty of Waitangi, not just Article Two that gives Maori rights to New Zealand's indigenous natural resources.

"Trout are an introduced species and therefore fundamentally different from the fish referred to in the Treaty, that were in the rivers and lakes at the time it was signed" he said.

"Today's decision clarifies the relationship between the Treaty, the law and fishing regulations and upholds Parliament's right under the Treaty to create laws. It is a statement for the application of all three Articles of the Treaty.

Mr Johnson said the matter of costs had not yet been settled by the court, but that an important principal was involved.

"Anglers and hunters, through their licence fees, have paid the bills for what amounts to a major constitutional ruling which is of significance to the Government and all New Zealanders.

"This goes way beyond what these people would consider a reasonable use of their fees."

He said Fish and Game New Zealand would now take time to consider the implications of the judgement in detail.

Taranaki Fish and Game Council chairman Don McMillan welcomed the decision, saying it would not affect Fish and Game New Zealand's existing obligations under the Treaty.